

REMARKS/ARGUMENTS

The courtesy of the interview granted Applicants' representatives on August 30, 2006 by Examiner Douyon, the examiner in charge of this application, is acknowledged with thanks and appreciation. At the interview, Examiner Douyon articulated the substance of the rejection of claim 49 over the Kenkare et al. and Lauwers references in more detail, including with reference to passages from the cited reference. It was the Examiner's position that the combination of the Kenkare et al. and Lauwers references was proper and that the references fairly taught the packaging a hydrogen peroxide solution with an aerosol propellant in a bare or uncoated aluminum container. Applicants' attorney argued that the Kenkare et al. and Lauwers references were not properly combined and that it was not obvious to package a peroxide composition and aerosol propellant in a bare aluminum container. The substance of Applicants' arguments is reproduced in part below. No agreement was reached. Applicants' attorney indicated that Applicants may submit a Declaration under 37 CFR § 1.132 in support of Applicants position as to the patentability of the claimed invention over the cited references.

By the present amendment, claim 98 has been amended to overcome an objection with respect to support for the term "aerosol propellant". The term "aerosol" has been deleted from claim 98. It is believed that claim 98 is free from any objections under 35 U.S.C. § 112, second paragraph.

Also enclosed herewith in the Declaration of Montfort A. Johnsen under 37 CFR § 1.132 which will be discussed below in connection with the rejection of the claims over the cited prior art references.

Newly submitted claims 100-114 have been held to be directed to an invention that is independent and distinct from the invention originally claimed. Applicant believes that the Examiner is incorrect with respect her representation that the new claims are independent and distinct from the invention claimed in claim 49. Claims 100-114 are dependent on claim 49 and are therefore are included within the subject matter of claim 49. They cannot be independent and distinct. Whereas the scope of claims 1 and 49 was and remains different in scope, claims 100-114 have a scope no broader than claim 49 because they are all dependent on claim 49. It is

therefore believed that the Examiner's refusal to examine claims 100-114 is inappropriate and that these claims have not been constructively elected by the previous election of claim 49 and the claims dependent therefrom for prosecution on the merits. In any case, these claims that are dependent on claim 49 should be allowed in the event that claim 49 is found to be allowable. Reconsideration of the restriction requirement as to new claims 100-114 is respectfully requested.

Claim rejections 35 U.S.C. § 103(a)

Claims 49, 51, 52, 54, 96-99 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over the Kenkare et al. U.S. Patent No. 3,722,752 (Kenkare et al. '752 patent) in view of Lauwers et al. U.S. Patent 6,021,926 (Lauwers et al. '926 patent). This rejection is respectfully traversed.

The Kenkare et al. '752 reference is described in part by the Examiner. Applicants would add, however, that the smaller compartment in the Kenkare et al. '752 package is a plastic pouch and is not made of metal. Although the composition of the smaller compartment or sac is not disclosed in the Kenkare et al. '752 reference, Kenkare et al. refer to U.S. Patent No. 3,325,056, which discloses to the two compartment container described by Kenkare et al. '752 wherein the collapsible smaller compartment or sac is said to be made of a flexible plastic tube. By reference, the disclosure in Kenkard et al. '752 of a collapsible plastic sac is incorporated from the Lewis '056 patent. As the Examiner will see from the attached Declaration of Montfort A. Johnsen (Johnsen Declaration), who has spent more than 50 years working in the aerosol industry in a scientific capacity, the industry typically used a polyethylene tube for these types of products.

The Lauwers et al. '926 patent discloses an aerosol dispenser containing a concentrated detergent mixture designed to be dispensed in a washing machine by the use of a nonflammable propellant. Hydrogen peroxide is briefly mentioned merely as one of a group of oxidants that might react with peroxidase enzymes to do "solution bleaching". As explained by Mr. Johnsen in his Declaration, this particular technology is known, but very rarely used, since the hydrogen

peroxide is so prone to react with various other detergent ingredients and self-destruct in the process. Mr. Johnsen further points out that hydrogen peroxide is not listed in any of the cited examples, nor is it recited in any of the claims. Mr. Johnsen further avers that, if hydrogen peroxide were to have been included in any of the examples presented, it would slowly reactant with such things as monoethylenoamine and the perfumes, to the overall detriment of the formulation. Johnsen Declaration, ¶ 10.

Contrary to the Examiner's representation, Lauwers et al. '926 is not analogous art. This fact is substantiated by the Johnsen Declaration, (Johnson Declaration, paragraph 13). The Lauwers et al. '926 composition is in a single package. As indicated by Mr. Johnsen and his Declaration, hydrogen peroxide would not likely be used in any of the Lauwers et al. '926 compositions because of its undesirable characteristics with respect to the other components of the detergent composition. On the other hand, the Kenkare et al. '752 aerosol package has special problems which are not present in the composition of the Lauwers et al. '926 reference. As pointed out by Mr. Johnsen in his Declaration, the hydrogen peroxide as an oxidant in the Kenkare et al. '752 reference must be kept separate from the shaving cream or other cosmetic because it will react, and is intended to react, with the specific chemical reducing compounds. Johnsen Declaration, ¶ 13.

The alleged combination of Kenkare et al. '752 and Lauwers et al. '926 is traversed. There is no basis for making the alleged combination. The Examiner is attempting to piece together various unrelated bits and pieces of the Lauwers et al. '752 into the Kenkare et al. '752 disclosure to build by hindsight Applicants' claimed invention without any rational basis. The Examiner has given no rational basis for her hindsight reconstruction of Applicants' claimed invention.

Considering the unlikely use of hydrogen peroxide in the Lauwers et al. '926 composition, there is no teaching of use of a composition which includes a hydrogen peroxide in a bare aluminum container. The Examiner has picked and chosen among unrelated pieces of the Lauwers et al. '926 disclosure to piece together a combination of references that attempt to meet Applicants' claimed invention without any suggestion from the references or any rational basis

for combining the references save Applicants' disclosure. Applicants submit that the alleged combination of these two references is inappropriate and in any case would not meet Applicants claimed invention.

Further, the use of a metal container in the Kenkare et al. '752 aerosol package would not be functional because the container would not be collapsible as required by Kenkare et al. '752. Although Kenkare '752 does disclose the possibility of packaging an aerosol with the hydrogen peroxide, there is no disclosure in Kenkare et al. '752 of the use of a rigid container for such a combination. The alleged combination of Lauwers et al. '926 and Kenkare et al. '752 would require a rigid metal container within Kenkare package for dispensing the shaving composition of Kenkare et al. '752.

In summary, Applicants believe that the alleged combination of Lauwers et al. '926 with Kenkare et al. 752 is an inappropriate combination of references which is unsuggested by the disclosures.

Turning now to the Johnsen Declaration, Montfort A. Johnsen is an expert in the aerosol packaging field. Mr. Johnsen has advanced degrees in chemistry, including graduate work beyond the level of a master's degree and has worked in a technical capacity the aerosol industry continuously for more than 50 years. He currently serves as a consultant for a number of companies which include Procter & Gamble, Colgate-Palmolive, Dupont, S.C. Johnson & Son, the Schering-Plough Corporation, and Reckitt & Benkizer Household Products, Inc. with respect to their household products. Mr. Johnsen is a recognized expert in the aerosol industry.

Further, Mr. Johnsen has firsthand knowledge of the development of the aerosol package which is the subject matter of the present application, including the elected claims in this application as a result of a previous consulting arrangement with BISSELL Homecare, Inc. (BISSELL), the assignee of the above-identified application. Mr. Johnsen has studied both the Kenkare et al. '752 and Lauwers et al. '926 references as well as the Examiner's final rejection of the claims over the cited references. He has also reviewed the patent application and rejected claims in the application. Mr. Johnsen has considerable experience in the technology of Kenkare

et al. '752 as well as the technology of Lauwers et al.' 926 as a result of his long experience in the aerosol industry. Mr. Johnsen discusses in his declaration each of the two references, their differences and opines that the compositions of the two cited references are far different and form radically different aerosol products. Mr. Johnsen has concluded that these two references are not analogous art. Johnson Declaration, ¶ 9-13. Still further, Mr. Johnsen further concludes from his experience in over 50 years in the field of aerosol containers that it is not likely that anyone would package any of these aerosol compositions in a bare aluminum container because of the difficulties in manufacturing the aluminum containers from uncoated aluminum and a high probability of corrosion. Johnson Declaration, ¶ 14.

Still further, Mr. Johnsen discusses his consulting work for BISSELL and the challenges that the BISSELL inventors overcame to developing the aerosol product that is the subject of this patent application. "One of the major problems was the ability to package the hydrogen peroxide composition in an aerosol container of any sort." Johnsen Declaration, ¶ 15. He further opines that it was quite surprising that the hydrogen peroxide composition could be packaged in a bare aluminum container and further opines that the hydrogen peroxide composition could not be packaged in a coated aluminum container because of the contamination from coatings with the aerosol propellant. Still further, Mr. Johnson states that, to his knowledge, the BISSELL hydrogen peroxide composition is the only hydrogen peroxide aerosol product in the country and, furthermore, the only aerosol product that is packaged in a bare or uncoated aluminum container, rather than lined container. Johnsen Declaration, ¶ 16. This testimony from an expert in the field demonstrates that the Examiner's alleged combination of Lauwers et al. '926 and Kenkare et al. '752 is inappropriate, and, in any case, would not lead one having ordinary skill in the aerosol packaging art to package the claimed hydrogen peroxide composition in a bare aluminum container.

In view of the foregoing, it is submitted that the alleged combination of Kenkare et al. '752 and Lauwers et al. '926 is inappropriate and can not be tenably made. For this reason, Applicants believe that claims 49, 51, 52, 54, and 96-99 are all patentable over the alleged combination of Kenkare et al. '752 in view of Lauwers et al. '926.

Claims 55 and 56 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Kenkare et al. '752 in view of Lauwers et al. '926 and further in view of the Hart et al. U.S. Patent No. 3,970,584 (Hart '584). This rejection is respectfully traversed.

Because this rejection is based on the alleged combination of Kenkare et al. '752 and Lauwers et al. '926 as applied against claim 49, this rejection is also fatally defective because it does not disclose the subject matter of claim 49, from which claims 55 and 56 depend. It is therefore believed that claims 55 and 56 patentably distinguish over the Kenkare et al. '752, Lauwers et al. '926, and Hart '584 references.

Claims 58 and 59 have been rejected as unpatentable over Kenkare et al. '752 in view of Lauwers et al. '926 as applied to claim 49 and further in view of the Schmitt U.S. Patent No. 3,866,800 (Schmidt '800). This rejection is respectfully traversed.

Because this rejection is also based on the untenable combination of Kenkare et al. '752 in view of Lauwers et al. '926 as set forth above, this rejection is also fatally defective. There is nothing in the Schmitt '800 reference which meets the limitation of claim 49. It is therefore believed that claims 58 and 59 patentably define over Kenkare et al. '752 in view of Lauwers et al. '926 and in view of Schmitt '800 for the same reasons that claim 49 defines over Kenkare et al. '752 in view of Lauwers et al. '926.

Claim 57 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Kenkare et al. '752 in view of Lauwers et al. '926 as applied to claim 49 and further in view of Miles U.S. Patent No. 3,722,753 (Miles '753). This rejection is respectfully traversed.

Because this rejection is also based on the untenable combination of Kenkare et al. '752 in view of Lauwers et al. '926 as applied against claim 49, this rejection is also fatally defective. Because claim 57 depends from claim 49, it patentably distinguishes over the Examiner's alleged combination of Kenkare et al. '752 and Lauwers et al. '926, with or without Miles '753, for all of the reasons stated above with respect to the rejection of claim 49. It is therefore submitted that claim 57 patentably distinguishes over any tenable combination of Kenkare et al. '752, Lauwers et al. '926, and Miles '753.

Claim 94 has been rejected as claim 49 over the Kenkare et al. '752 reference in view of Lauwers et al. '926 and further in view of the Barger et al. U.S. Patent No. 5,921,447 (Barger et al. '447). This rejection is respectfully traversed.

Because this rejection is also based on the untenable combination of Kenkare et al. '752 in view of Lauwers et al. '926 as set forth above, this rejection is also fatally defective. Kenkare et al. '752 and Lauwers et al. '926 are not tenably combined and do not teach the features of claim 49 for the all the reasons set forth above. Therefore, claim 94, which depends from the claim 49, patentably distinguishes over the examiner's alleged combination of Kenkare et al. '752, Lauwers et al. '926 and Barger et al. '447.

Finally, claim 95 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Kenkare et al. '752 in view of Lauwers et al. '926 as applied to claim 49 and further in view of the Spitzer et al. U.S. Patent No. 3,970,219 (Spitzer et al. '219). This rejection is respectfully traversed.

Because this rejection also depends on the alleged combination of Kenkare et al. '752 and Lauwers et al. '926, it is fatally defective for all of the reasons set forth above with respect to claim 49. Spitzer et al. '219 does not add any disclosure that would meet the limitations of claim 49 and thus, the alleged combination of Kenkare et al. '752, Lauwers et al. '926 and Spitzer '219 cannot meet the limitations of claim 95. Although Spitzer et al. '219 discloses a laundry list of containers that can be used for aerosol components, there is no disclosure in Spitzer et al. '219 of a hydrogen peroxide aerosol composition in any of these containers. It is therefore believed that Spitzer '219 is not properly combinable with the Kenkare et al. '752 reference.

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Examiner: Lorna M. Douyam
Group Art Unit: 1751

In view of the foregoing remarks and amendments is submitted that all of the claims in the application are in condition for allowance. Early notification allowability is respectfully requested.

Respectfully submitted,

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